No. 86-228

In The
Supreme Court of the United States
October Term, 1986

JUOZAS KUNGYS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY BRIEF TO THE BRIEF OF THE UNITED STATES

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SUMMARY

The Questions Presented on which this Court granted certiorari all involve the proper standard for determining the "materiality" under the denaturalization statute, 8 U.S.C. § 1451(a), of misrepresentations as to date and town of birth at both the visa application and naturalization stages of citizenship. The lynch pins of the Third Circuit's decision to reverse the District Court were its false perception that the record contained an ultimate disqualifying fact (that non-preference, quota immigration visas were issued only to victims of Nazi persecution); and its faulty "probability" test under the second prong of *Chaunt,* pursuant to which it made the *de novo* finding that if an investigation were conducted as a result of the disclosure of the immaterial date and place of birth, it "probably" would have led to the disclosure that petitioner was not a "victim of Nazi persecution." Thus, even the Third Circuit's "probability" test requires proof of the actual existence of an "ultimate disqualifying fact." Here, as the District Court found, the objective evidence clearly shows that displaced persons, such as petitioner, were eligible for non-preference, quota immigration visas without any need to show they were also victims of Nazi persecution.

Although the Government did not file a cross petition for certiorari, it now argues for the even more diluted "possibility" or "might have" tests under the second prong of *Chaunt,* even if devoid of proof of any disqualifying fact. The Government equates "might have" with "possibility" which by definition is speculative and impossible to reconcile with an evidentiary standard that requires proof that is clear, convincing and unequivocal which does not leave any issue in doubt before a citizen

can be denaturalized. *Schneiderman v. United States,* 320 U.S. 118 (1943). The confusion, which the Government's argument reflects, emanates from two different expressions by this Court in *Chaunt* of an alternative approach to proving materiality when the suppressed facts would not, if known, have justified denial of citizenship. The initial expression in the majority opinion was "Or disclosure of the true facts might have led to the discovery of other facts which would justify denial of citizenship" (*id* at 353); whereas the second time the alternative was expressed as " . . . or (2) that their disclosure might have been useful in an investigation possibly leading to the discovery of other facts warranting denial of citizenship" (*id* at 355). However expressed, the alternative approach requires doubt-free proof of the actual existence of an independent, ultimate disqualifying fact, i.e. "the discovery of other facts which would justify denial of citizenship." What needs clarification is the level of proof needed to connect the suppressed facts to the independent, ultimate disqualifying fact. Only the certainty test is consistent with the doubt-free test. The "doubt-free" test is at least the equivalent of the "beyond a reasonable doubt" criminal test; whereas a "probability" test at best reaches a "preponderance" of the evidence tort test; and, of course, a mere "possibility" test would be less than that required in any other type of judicial proceeding under our system of justice.

Moreover, the Government can not avoid the materiality requirement of a misrepresentation under the denaturalization statute or its burden of proof by the doubt-free test by reference to other statutes or by reference to the inapplicable "illegal procurement" language reinstated by the 1961 Amendment to Section 1451(a).

ARGUMENT

I. There Is No Doubt-Free Proof Of The Existence Of An Ultimate Disqualifying Fact

At trial, the District Court posed the question to the Government trial attorneys, "Mr. Lynch, have you shown me such a regulation [requiring the recipient of a non-preference quota immigration visa to be a victim of Nazi persecution]?" The Government trial attorney was compelled to say "No, Sir." (Lodging, R. 1298) (Brackets added).

Neither the Solicitor General nor the amici organizations have shown this Court any such regulation because it never existed, and thus, the District Court's question to the Government is equally apt for this Court to pose to the Government. It was the petitioner who put in evidence the actual regulation then in effect (22 C.F.R. § 61.313) and the Presidential Directive of December 22, 1945, and neither contained any such requirement. (See Pet. App. 140a-151a)

Under the national origins quota system pursuant to which petitioner received his visa under the Immigration Act of 1924, petitioner was either exempt or not excludable under any of the 31 enumerated categories of exclusion (none of which excluded non-victims of Nazi persecution) set forth on the application for visa (J.A. 31-32) (Reply App. 7a). As a native born Lithuanian he was thus eligible to receive an immigrant visa under the quota for Lithuania. To the extent any visa numbers were available for those in the non-preference category, he was entitled to a first priority since he was a displaced person covered by the Presidential Directive of December 22, 1945 (Pet. App. 141a).

There was nothing in the statute or the regulations which gave either a preference or a priority to victims of Nazi persecution, let alone set forth an exclusion or disqualification for non-victims of Nazi persecution. Neither the Government nor the amici have cited to any State Department circular[1], any I.N.S. publication or any visa refusal card which makes any such reference. (Reply App. 11a-12a) Nowhere in the visa application is there any question which inquires as to whether the immigrant was a victim of Nazi persecution, as the Government's former vice consul conceded (J.A. 218). The Government has now attempted to rationalize the Third Circuit's interpretation of the testimony of a former vice consul (who did not process petitioner's visa application) to reflect an *unwritten*, informal policy because it can neither produce nor cite to any document embodying such policy. Mr. Finger's complete testimony on the so-called requirement was that the victim of Nazi persecution visa "policy" was embodied in the published regulations which the Government attorneys showed him during his trial preparations (J.A. 218, 227-228). Since even the Government must now concede that there never was any such regulation, it is clear that the District Court was correct in its finding that Mr. Finger was in error (Pet. App. 120a). It is equally clear from the statute, the regulations, and the contemporaneously prepared historical documents (Ukrainian Amicus App.

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[1] The petitioner offered in evidence the Department of State Circular, July 8, 1947, which provided Information Concerning Immigration Into The United States From Germany And Austria to the Stuttgart Consular office from which petitioner received his visa on March 4, 1948 (Pet. App. 152a-155a). The District Court excluded the circular, which makes no reference to "victims of Nazi persecution", as of "marginal relevance" (Lodging, R. 1298), since the Government had not produced any such regulation.

25a-119a), that Mr. Finger remembered something which objectively never existed. Moreover, even Mr. Finger did not claim vice consuls had the authority to issue visas on the basis of an unwritten, undocumented "policy," as now argued by the Government as part of its "probability" test. (U.S. BR. 35-42).

Vice consuls had no authority to give preference or visa priorities to victims of Nazi persecution, let alone create an exclusion disqualifying non-victims of Nazi persecution. (See Note 119,22 C.F.R. § 61.301, Reply App. 7a). The regulations then in effect provided that, "An immigration visa may be refused only on a ground provided in the law and regulations." 22 C.F.R. § 61.346(c).

In his Directive of December 22, 1945, President Truman directed that displaced persons be issued visas under "*existing* quota laws" and that "Visas should be distributed fairly among persons of all faiths, creeds and nationalities" (Pet. App. 148a-149a) (emphasis added) — an historical evidentiary document in direct conflict with the Government's revisionist contention that, prior to the Displaced Persons Act, quota immigrant visas were issued "almost exclusively to Jews who by definition were victims of Nazi persecution" (U.S. BR. 36).[2] That contention would also certainly be startling to the non-Jewish committees who produced affidavits and funds for the transportation of non-Jewish displaced persons. (See Table No. 4, Ukrainian Amicus App. 42a). As stated in the INS Monthly Review of January 1948, "Persons sponsored by agencies are generally of the same religious faiths

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[2] The Government misquoted the legislative report, which states; "It was stated that the *German* quota was available almost exclusively to the Jews. A total of 7,799 displaced persons were issued visas under the German quota." *Displaced Persons In Europe*, p. 26, S. Rep. 950, 80th Cong. 2d Sess. 26 (1948).

as the social agencies sponsoring them." (*id* at 43a). As indicated on his visa application, petitioner was one of the 1,096 Catholic displaced persons whose passage was paid for by the Catholic Committee for Refugees. (J.A. 32).

Irrespective of whether he was a victim of Nazi persecution, the petitioner was eligible for a non-preference quota immigration visa. Thus, the Government has not shown the existence of any ultimate disqualifying fact. Certainly uncorroborated testimony in conflict with objective historical evidence does not constitute evidence that is so clear, unequivocal and convincing that it does not leave the issue in doubt.

II. The Court of Appeals Correctly Held That Petitioner's Alleged Omissions of Wartime Residences and Occupations Were Not Material Under The Second Prong Of Chaunt

In its Argument I, the Government would have this Court give a *de novo* review of the record to determine whether the alleged omissions by petitioner of one of his wartime residences and wartime occupations were "material" for denaturalization purposes under a "might have" test. (U.S. BR. 16-29) The Government's Brief criticizes the petitioner for focusing on the misrepresentations of date and place of birth and giving only "the briefest mention" to his wartime residences and occupations (U.S. BR. 17). The Third Circuit, however, even under its "probability" test held that, "With respect to the defendant's misrepresentations or concealments concerning his wartime occupations and residences, we agree with the district court that they do not pass the *Chaunt* materiality test." (Pet. App. 33a).

The Government is wrong in arguing that "Petitioner does not dispute that throughout the visa and naturaliza-

tion process he repeatedly misrepresented and concealed his . . . wartime residence, and wartime occupation" (U.S. BR. 17). Whereas the visa application sought his residences from the age of 14, it sought only his then "calling or occupation" (J.A. 30); and neither his declaration of intention nor his application nor his petition for citizenship even requested his wartime residences or occupation (J.A. 38-50). Section 7(b) of the 1924 Act required residences only for 5 years preceding the visa application, or here back to January 1942, all of which were correctly listed by Petitioner.

The Government's Statement implies that the petitioner listed his residence in Telsiai, Lithuania for the years 1941 and 1942 in his visa application because "The record contains no evidence of any atrocities having been committed in Telsiai" (U.S. BR. 6). The record, however, contains, as a Government Exhibit, the Certification of the Seminary of Telsiai that he was a student in Telsiai during 1941 (J.A. 51-52). As the District Court found, petitioner was a resident of Telsiai as of "mid October 1941, when both sides agree he again entered Telsiai Seminary." (Pet. App. 111a).[3]

Moreover, the District Court rejected the Government's implication of petitioner thwarting an investigation by the consular officers when it found,

> "Seymour Maxwell Finger, who served as a vice consul in Stuttgart in January 1941 testified that disclosure of a residence in Kedainiai in 1941 would not have raised any questions in his mind. This is to be expected because there were few if any significant dis-

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[3] Although the Government did not make it part of the "record" in this case, it has been historically reported that the Nazis did commit atrocities in Telsiai. O. Savich, The Fate of the Jews in the City of Telshai, referred to in The Black Book published by the Holocaust Library, New York. (1980). L.C. 81-81517.

tricts in Lithuania, or in all of Eastern Europe for that matter, in which atrocities against the Jewish population did not take place. Defendant's wife's visa application listed her birth place and residence in Kedainiai." (Pet. App. 119a).

Mr. Finger testified he did not even know where Kedainiai was, although he saw it listed on petitioner's visa application (J.A. 208). Indeed, Mr. Finger's observation of the name Kedainiai from the face of the visa application is significant since the petitioner obviously, at a minimum, told the German speaking personnel at the American Consulate, who filled out the form, that Mrs. Kungys was born in Kedainiai, a fact which is listed immediately below the places listed under the residences on his application for visa (J.A. 30). Former CIC officer Hartman's testimony established that there were a great deal of discrepancies between entries on visa forms and what the applicant actually said to the American Vice Consuls, and that generally the visa applicant was simply asked whether the data was correct, but "he had no way of knowing. The documents were in English." (X1727-1730, X1735-1741). Mr. Finger admitted that no one at the American consulate spoke Lithuanian. (J.A. 197). The record also contains the deposition of Kostas Januk[illegible] which shows that he was granted a visa, notwithstanding being from Kedainiai and being a former member of the Siauliai as he so listed on his visa application without triggering off any investigation. (X1105-1165, X189-192).

Thus, the Court of Appeals was hardly clearly erroneous when it further held, " . . . because there is no hard evidence in the record that the consular officials in Stuttgart had knowledge of these particular atrocities at the time defendant applied for his visa, the government accordingly did not prove that knowledge of the defendant's

residence would have prompted an investigation." (Pet. App. 35a). Indeed, the record shows that neither this Government, nor the Third Reich, nor any other organization or government, including the Soviet Union (X19-20) had any evidence that petitioner participated in any atrocities either as of the time he received his visa in March 1948 or his citizenship in February 1954. (See, Reply Memorandum to Amici Briefs, pp. 6-8, 10-11).

Although the Government would have this Court establish a standard of materiality which would permit speculation as to what an investigation conducted then "might" have disclosed, the Government admitted during discovery that there was no information about petitioner in the record of the Federal Bureau of Investigation, the Central Intelligence Agency, the State Department Office of Security, the Berlin Document Center, the Federal Republic of Germany, the Weisenthal files, the International Refugee Organization, and the Subcommittee of Immigration, Citizenship and International Law of the Judiciary Committee. [Answers to Interrogatories No. 39, 41-45, and 48 (X1314-1315)].

There is no contemporaneous Soviet report or document in the record referring to petitioner as either the leader or participant in the atrocities. Indeed, two of the Soviet witnesses testified that they had read Communist newspaper articles about the atrocities in Kedainiai after the War and they made no reference to petitioner, but instead stated that one Kubiliunas was shot for being the leader of those atrocities. (Dailide, X1014-15 and Devidonis, X721, see also X234).

The Government introduced voluminous German records which depicted the Nazi persecutions and murders

throughout Lithuania (G Series, X212-474).[4] The Government admitted that none of the German records contains petitioner's name or indicates that the petitioner had in any way participated in any of the persecutions or killings. (Admission No. 26, A573).

The Government's Statement further erroneously states that ". . . petitioner's visa application listed his occupation as dental technician [J.A. 30]; it did not reveal his position as a bank employee and the supervisor of a factory during the Nazi occupation of Lithuania" (U.S. BR. 6). Yet, the Application For Immigration Visa (Quota) of petitioner does not even ask for wartime occupations. The only space to be filled in as to occupation calls for a statement in the present tense only, "That my calling or occupation is", to which the petitioner correctly answered "dental technician" (J.A. 30). On January 14, 1947 the Fellbach Police Chief certified to the American Consulate the good conduct of petitioner, "the dental-technician." (J.A. 37). The petitioner also submitted to Vice Consul Frank K. Schilling his internal Lithuanian passport, dated March 26, 1944, which correctly revealed his then "Occupation Office-worker," as translated by the Government (J.A. 28).

Not even the Alien Registration form required petitioner to list his job as a bookkeeper with the Bank of Lithuania in 1941. In part 9, petitioner accurately listed his "usual" and "present" occupation as dental technician. Part 10(a) inquired, "I intend to be engaged in the following activities in the United States" to which he

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[4] The only Government witness to testify at the trial pertaining to the Nazi persecutions and killings was an historian, Raul Hilberg, who gave "historical" testimony and discussed his reconstruction of the contents of the German war records. He had no knowledge of petitioner. (A432-433).

answered "unknown". Part 10(b) inquired "I have been within the past 5 years, engaged in the following *activities*" to which he answered on January 9, 1947 "student, dental technician, farmer and forestry work". (J.A. 34-35) (emphasis added). The only other "activity" petitioner engaged in from January 1942 to January 1947 was being a clerk-bookkeeper in a brush and broom shop, which has no conceivable connection to aiding the Nazi war effort or participation in atrocities.

The Court of Appeals was not clearly erroneous in holding that any alleged omission of petitioner's wartime occupation at the visa stage was not "material" under *Chaunt* and in agreeing with the District Court's finding that petitioner was no more than a clerk-bookkeeper in a brush and broom shop in Kaunas during the Nazi occupation (Pet. App. 35a). Indeed, the District Court expressly found that, "Professor Finger also testified he would not have denied a visa even to a manager of a 15 employee brush and broom factory. . ." (Pet. App. 119a).

The Government, thus, is misdirected in focusing on partial "omissions" of wartime occupations and residences and in misconstruing *Fedorenko* as requiring this Court as its standard of review to make a *de novo* review of the record in every denaturalization case. This Court has indicated it would review the entire record when it was "important to the liberty of the citizen." *Chaunt v. United States*, 364 U.S. 350, 352-353 (1960); *Costello v. United States*, 365 U.S. 265, 269 (1961); and *Fedorenko v. United States*, *supra* at 756, n.11, 12.

III. The Requirements For Proving False Swearing, Perjury or Lack Of Good Moral Character Under Other Statutes Do Not Govern The Standard For Proving Materiality Under The Denaturalization Statute

The Government seeks to rationalize a diluted standard of proof of materiality, which would not even require the

existence of an ultimate disqualifying fact, by citing to *other* statutes which provide criminal penalties for making false statements and then falsely concludes it would be anomolous to require a higher standard of materiality for denaturalization than for criminal prosecution for making false statements. (U.S. BR. 14-15, 24-28). The Government has made the same argument and cited to the same perjury statutes and many of the same pre-*Fedorenko* cases, which this Court found unpersuasive in *Fedorenko v. United States*, 449 U.S. 490 (1981). (See Fedorenko U.S. BR. 15, 36-38).

The "grave consequences" incident to denaturalization, which could involve the ultimate severity of death in the instant case, were strongly emphasized by this Court in *Klapprott v. United States*, 335 U.S. 601, 612 (1948), in pointing out that,

> "This Court has long recognized the plain fact that to deprive a person of his American citizenship is an extraordinarily severe penalty. . . . 'It may result also in loss of both property and life; or of all that makes life worth living. *Ng Fung Ho v. White*, 259 U.S. 276, 284.' "

While the exposure to a fine and maximum imprisonment of 5 years for perjury or false swearing is indicative of their serious nature, they pale in significance to the grave consequences of denaturalization. If there is any anomoly it is that the defendant in such criminal cases, who is subject to substantially less severe consequences, has the greater constitutional protections of trial by jury, of the charges in an indictment, returned by a grand jury, the privilege against self-incrimination and the presumption of innocence. There is no anomoly that the Government is required under the denaturalization statute to prove materiality of a misrepresentation by evi-

dence that is doubt free in a non-jury trial. *Chaunt v. United States, supra* at 352-353.

In its opinion in *Fedorenko* [587 F.2d 946 (1979], the Fifth Circuit Court of Appeals recognized the doubt-free test, but enigmatically held that *Chaunt* requires only that the investigation "might have" uncovered other facts warranting denial of citizenship. This Court rejected the Fifth Circuit's mere "possibility" interpretation of *Chaunt* in *Fedorenko.* The Government nevertheless has reasserted the mere "possibility" test in its Brief herein. (U.S. BR. 16-28, 44).

In his concurring opinion in *Fedorenko,* Justice Blackmun gave the reason the Court rejected the holding of the Fifth Circuit, in stating,

> ". . . I must join the Court in not accepting the reasoning of the Court of Appeals, which would have diluted the materiality standard. . . By concluding that the Government has demonstrated the actual existence of disqualifying facts—facts that themselves would have warranted denial of petitioner's citizenship—this Court adheres to a more rigorous standard of proof.
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> . . . Application of [the Court of Appeals'] standard suggests that a deliberately false answer to any question the Government deems worth asking may be considered material. I do not believe that such a weak standard of proof was ever contemplated by this Court's decisions prior to *Chaunt.*
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> Instead, I conclude that the Court in *Chaunt* intended to follow its earlier cases and that its 'two tests' are simply two methods by which the existence of ultimate disqualifying facts might be proved."[5] (490 U.S. at 523-524).

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[5] Justice Blackmun noted that, "[T]he 'second [*Chaunt*] test' simply asks whether knowledge of the suppressed facts could have enabled the Government to reach the ultimate disqualifying facts whose existence is now known." 490 U.S. at 525, n.15.

The majority opinion of this Court in *Fedorenko* cited with approval to the Ninth Circuit opinion in *United States v. Rossi,* 299 F.2d 650 (9th Cir. 1962), for the rule that "materiality of a false statement in a visa application must be judged in terms of its effect on the applicant's admissibility into this Country." 490 U.S. at 509.

That court of appeals was not persuaded by the Government's argument that Rossi's intentional misrepresentation and suppression of the truth in the course of the proceedings for naturalization prevented a proper investigation of his eligibility for citizenship and demonstrated a lack of good moral character to revoke his citizenship without regard to the effect true answers would have had on his application.

Although the Government quotes from Justice Marshall's opinion in *Fedorenko* as to the importance of false testimony in the naturalization process, the Government miscomprehends the important distinction between naturalization and *de*naturalization cases as described in both *Berenyi v. District Director,* 385 U.S. 630, 636-637 (1967) and *In re Petition of Haniatakis,* 376 F.2d 728 (3d Cir. 1967).

Here the District Court properly concluded from its analysis of *Chaunt,* "that not all false statements or concealments made during the naturalization process will form a basis for revocation of citizenship, even when the person seeking citizenship made the false statements or concealments under oath," noting that "the *Chaunt* rule is reflected in the Third Circuit opinion in *United States v. Riela, supra.*" (Pet. App. 127a).

With respect to the Government's attempt to graft the pre-naturalization Section 1101(f)(6) onto section 1451(a), petitioner did not provide immigration officials with a

false date and place of birth "for the purpose of obtaining any benefits," not otherwise available to him under the Immigration Act of 1924. Petitioner supplied the vice consul with his internal Lithuanian passport, dated April 26, 1944, (J.A. 26-29), which he obtained from an anti-Nazi resistance municipal employee who backdated his date of birth to October 4, 1913, thereby making him over 30 years old, and placing his birth in the City of Kaunas, rather than rural Reistru. (Lodging, 934-936, 950, A.1128). On April 22-23, 1943, German General Jackeln had threatened Lithuanian General Plechavius with the "harshest repressions" to Lithuanians if he failed to mobilize into the German Army 80,000 Lithuanians with an emphasis on youth led by Lithuanian officers (X1229, 1236, 1242-1243). Petitioner obtained the falsified passport to avoid being conscripted into the German Army as a young officer (presumably under 30 years old) and obviously believed he would be less likely to be conscripted by the Kaunas general as a native of Kaunas, rather than as a farm boy from Reistru. (Answer to Interrogatory 1). Petitioner also changed his street address to deter being rounded up by the Nazis (J.A. 29). At the time, petitioner was engaged in the underground activities of printing and distributing underground newspapers urging resistance to German mobilization. (Pet. App. 114a-115a). Thus, it was not the petitioner's purpose to gain an immigration benefit from perpetuating the information in his passport, since there was no advantage under the immigration laws to being two years older or being from a city. (Pet. App. 119a, 135a).

IV. Petitioner's Citizenship Was Not Illegally Procured

The District Court ruled that petitioner had not "illegally procured" his citizenship under 8 U.S.C. § 1451(a), since none of his false statements or omissions, "both singly

and in the aggregate," were "material." (Pet. App. 122a-124a). The Third Circuit also rejected the arguments of the Government that either "any misrepresentation" or a "pattern of misrepresentations" was a sufficient showing of lack of good moral character based on the false testimony provisions of 8 U.S.C. § 1101(f)(6) for purposes of denaturalization, and held that,

> "We adopt the view, heretofore articulated in *United States v. Sheshtawy*, 714 F.2d 1038, 1041 (10th Cir. 1983), and impliedly accepted in *Haniatakis*, 376 F.2d at 731, and in *Maikovskis v. I.N.S.*, 773 F.2d 435, 440-41 (2d Cir. 1985), that the *Chaunt* materiality test is invoked when the government attempts to denaturalize a citizen based on the false testimony provisions of section 1101(f)(6). We believe this disposition is consistent with the Court's decisions in both *Chaunt* and *Fedorenko* . . . . Consequently, our analysis under the 'concealment of a material fact or willful misrepresentation' portion of section 1451(a) will be no different than that under the illegal procurement provision. We will not permit the government to escape the *Chaunt* materiality requirement by invoking section 1101(f)(6)." (Pet. App. 27a-28a).

Nevertheless, the Government persists in its attempt to engraft upon the words "illegally procured" a meaning which could never have been intended by the Congress, and which is contrary to the 1981 decision of this Court in *Fedorenko v. United States, supra.* (U.S. BR. 45-48, see also 8, 11, 17, 23-28, 42-44).

As originally adopted in 1952, 8 U.S.C. § 1451(a) provided for denaturalization only upon a finding that citizenship was "procured by concealment of a material fact or by willful misrepresentation." Subsequently that section was amended in 1961 to add "illegal procurement" as an additional ground for denaturalization,[6] although there is

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[6] When petitioner applied for citizenship on October 23, 1953 and was granted citizenship in February 1954, "illegal pro-

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still the overlapping and identical requirement of materiality to the extent of any misrepresentation as held in *Fedorenko, supra.*

If the additional ground for denaturalization ("illegal procurement") were intended by implication to include *all* misrepresentations, *whether or not material*, then the statute would not have continued to provide the material fact concealment's language since such language would have been surplusage. Obviously the Congress in amending the statute did not intend to render meaningless the conditions attached to denaturalization based upon a misrepresentation or concealment. On the contrary, restoration of the "illegal procurement" ground for denaturalization was clearly intended to provide a mechanism for dealing with jurisdictional and status defects not based upon any misrepresentation or concealment.

On June 21, 1961, the Justice Department wrote to the Chairman of the Committee on the Judiciary with respect to proposed amendments of the denaturalization provisions of the Immigration and Nationality Act concerning substituting a diluted, mere "preponderance of the evidence" burden of proof for the doubt-free test, and with respect to restoring the ground of illegal procurements to exclude aliens "afflicted with any dangerous contagious disease." (Reply App. 1a-3a). Deputy Attorney General Byron R. White presented the Government's views that,

> "Viewed in the light of the severe consequences that attend the loss of American citizenship, often held over an extended period of time, the Department feels

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curement" was not part of the McCarren Act; 8 U.S.C. § 1451(a), and the petition referred only to the then statutory standard of "concealment of material fact." (J.A. 42). The 1961 amendment is silent as to any retroactive application. 1961 U.S. Code Cong. & Admin. News 729.

> that it cannot lend its support to any proposal to diminish the high degree of protection accorded citizenship by the existing evidentiary standards. Moreover, it is questionable that such action would withstand constitutional attack particularly in its retroactive aspects. The Department doubts that this method of facilitating denaturalization and expatriation would result in ridding the country of subversives, criminals or other undesirables. The present evidentiary rules are firmly entrenched; that regarding denaturalization survived the revisions made by the 1952 Act. In these circumstances, the Department does not feel that sufficient reasons exist for change." (*id.*, at 2a).

This Court has not departed from its holding that the denaturalization provision applies only to a willful misrepresentation of a *material* fact. *Costello v. United States*, 365 U.S. 265, 271-272, n. 3 (1961); *Fedorenko v. United States, supra.*

The "false statement" statute referred to in *Fedorenko* and the statute upon which the Government relies here to show lack of good moral character use almost identical language prohibiting admissibility to anyone "giving false testimony for the purpose of obtaining benefits under the Act." 8 U.S.C. § 1101(f)(6). But, here the petitioner did not make any misrepresentations "for the purpose of obtaining benefits under the Act," not otherwise available to him, since there was no advantage to being two years older or being born in a city instead of a rural town, nor any disadvantage from residing in Kedainiai or working as a bookkeeper for purposes of obtaining an immigration quota visa based on his country of natural origin, as the District Court expressly found. (Pet. App. 119a, 135a).

In any event, the 1961 Amendment to § 1451(a) can not be applied retroactively to denaturalize petitioner from his 1954 grant of citizenship. Although the Seventh Circuit Court of Appeals held in *United States v. Kairys*, 782

F.2d 1374 (7th Cir. 1986), *cert. denied* May 22, 1986, that the 1961 amendment applies to citizens who had already obtained their status before its enactment, that court of appeals in doing so departed from several of this Court's settled canons of statutory construction, including the "first rule" of statutory construction that an enactment should never be applied retroactively unless by clear and unequivocal language the legislature has manifested an unmistakable intent to do so. *United States v. Security Industrial Bank*, 459 U.S. 70, 79 (1982).

The plain fact, however, is that *nothing* in the 1961 amendment or its legislative history suggests that Congress even considered, much less intended, retroactive application. See 75 Stat. 656 (1961); H.R. Rep. No. 1086, 87th Cong. 1st Sess. 38-40 (1961), *reprinted* in 1961 U.S. Code Cong. & Admin. News 2950, 2982-84; 107 Cong. Rec. 18,280-86 (1961) (House); 107 Cong. Rec. 19650-57 (1961) (Senate). In 1952, Section 340(i) *freed* naturalized Americans from denaturalization for "illegal procurement," which had been a grounds for denaturalization before Congress enacted the Immigration and Nationality Act of 1952. *Compare* § 338(a) of the Nationality Act of 1940, 54 Stat. 1158-59 (1940), *with* INA § 340(a), 66 Stat. 260 (1952). Section 340(i) made the provisions of § 340(a) in which "illegal procurement" was deleted applicable to "naturalizations heretofore granted"—i.e., before 1952, when § 340(i) was enacted.[7] Therefore, the actual terms of the 1952 provision would make the 1961 change restoring "il-

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[7] There is nothing in the legislative history of § 340(i) to suggest that the 1952 Congress or the Justice Department anticipated that, should a later Congress amend § 340(a), the later amendment would automatically apply retroactively. See H.R. Rep. No. 1365, 82d Cong., 2d Sess. (1952), *reprinted* in 1952 U.S. Code Cong. & Admin. News 1653; S. Rep. No. 1137, 82d Cong., 2d Sess. (1952)

legal procurement" applicable only to *pre*-1952 "naturalizations heretofore granted", and post 1961 citizenship, but not to petitioner's 1954 citizenship.

This Court has interpreted the Citizenship Clause to mean that, "[o]nce acquired, this Fourteenth Amendment citizenship was not to be shifted, canceled, *or diluted*, at the will of the Federal Government . . . ." *Afroyim v. Rusk*, 387 U.S. 253, 262 (1967). (emphasis added). Whether or not denaturalization imposes "punishment" in a technical sense, the Government here certainly would impose on petitioner consequences "more grave than consequences that flow from conviction for crimes." *Klapprott*, 335 U.S. at 611. No more "harsh and oppressive" consequence can be imagined than to have one's American citizenship taken away, to be deported from the land where he has lived for almost forty years with his wife, and, as would likely be the case here, to be sent to the Soviet Union to be executed or sent to the Gulag for making the relatively innocuous misrepresentations of one's date and town of birth. The Citizenship Clause and the Due Process Clause forbid these consequences especially when the "illegal procurement" ground for denaturalization was not enacted until after petitioner's citizenship was obtained.

Respectfully submitted,

Donald J. Williamson
Counsel of Record for Petitioner

April, 1987

APPENDIX

UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE DEPUTY ATTORNEY GENERAL
WASHINGTON, D.C.

June 21, 1961

Honorable Emanuel Celler
Chairman, Committee of the Judiciary
House of Representatives
Washington, D.C.

Dear Mr. Chairman:

This is in response to your request for the views of the Department of Justice on H.R. 192, a bill "To amend sections 212, 310, 340, and 349 of the Immigration and Nationality Act."

The bill would amend by revision or addition certain provisions of the Immigration and Nationality Act. While the Department finds several of the amendments sought by the bill to be unobjectionable there are some provisions which it cannot support.

The provisions of the measure which the Department cannot support include subsection (c) of Section 4 which would substitute for the "clear, unequivocal, and convincing" evidentiary standard presently required to establish denaturalization the standard that denaturalization may be established by "a preponderance of the evidence." The same is true of the similar provision of section 5 regarding expatriation cases. Section 5 also would set forth as an evidentiary rule that one who has performed an act of expatriation shall be presumed to have done so voluntarily, permitting, however, the rebuttal of the presumption by a preponderance of the evidence. These provisions are

presumably intended to overrule the decisions of the Supreme Court in *Schneiderman v. United States*, 320 U.S. 118 (1943) (denaturalization) and *Gonzales v. Landon*, 350 U.S. 920 (1955), and *Nishikawa v. Dulles*, 356 U.S. 129 (1958) (expatriation). The rationale of these cases is that because United States citizenship is such a precious right, no person should be deprived of it under the ordinary evidentiary rules prevailing in civil actions and that the Government must establish its case by "clear, unequivocal, and convincing evidence which does not leave the issue in doubt." Viewed in the light of the severe consequences that attend the loss of American citizenship, often held over an extended period of time, the Department feels that it cannot lend its support to any proposal to diminsh the high degree of protection accorded citizenship by the existing evidentiary standards. Moreover, it is questionable that such action would withstand constitutional attack particularly in retroactive aspects. The Department doubts that this method of facilitating denauralization and expatriation would result in ridding the country of subversives, criminals, or other undesirables. The present evidentiary rules are firmly entrenched; that regarding denaturalization survived the revisions made by the 1952 Act. In these circumstances, the Department does not feel that sufficient reasons exist for change.

Subject to the comments hereafter made with respect to section 1 relating to aliens afflicted with any dangerous contagous disease, we would have no objection to that section; or to section 2 relating to the admission of certain aliens afflicted with tuberculosis; or section 3 which would require that all naturalization proceedings be determined under the provisions of the Immigration and Nationality

Act; or to subsections (a) and (b) of section 4 which would restore "illegality" as a ground for denaturalization.

With respect to section 1 of the bill existing law provides that among the classes of aliens who shall be ineligible to receive visas and who shall be excluded from admission to the United States are "Aliens who are afflicted with tuberculosis in any form, or with leprosy, or any dangerous contagious disease." The bill would amend this provision by omitting the specific references to tuberculosis and leprosy but would continue to provide for the exclusion of aliens who "are afflicted with any dangerous contageous disease." Some of the diseases which are included within the term "any dangerous contagious disease" are set forth in the regulations of the United States Public Health Service (42 C.F.R. 34.2(b)). While the diseases presently designated do not include active tuberculosis or leprosy it is assumed that with the elimination of these two specific diseases from the ambit of section 212(a) of the Act, the Public Health Service will include them among the diseases embraced within the cited regulation. In such event there would be no objection to this amendment.

Subject to revision of the bill to eliminate the objectionable features discussed above, the Department of Justice would have no objection to its enactment.

The Bureau of the Budget has advised that there is no objection to the submission of this report from the standpoint of the Administrator's program.

Sincerely yours,

Byron R. White
Deputy Attorney General

CHAPTER XXII
SUPPLEMENT A

DOCUMENTATION OF ALIENS ENTERING THE UNITED STATES

The following regulations, relating to the admission of aliens into the United States, are established as notes to section XXII-1 of the Foreign Service Regulations of the United States. So far as they relate to the administration by consular officers of the Immigration Act of 1924, as amended, the regulations are prescribed by the Secretary of State on the recommendation of the Attorney General, under the authority of section 24 of the act cited.

Effective September 10, 1946

CODE OF FEDERAL REGULATIONS

The CFR citations at the end of the following notes are section numbers of the Code of Federal Regulations.

QUOTA IMMIGRANTS

NOTE 104. DETERMINATION OF QUOTA NATIONALITY.

(a) Section 12 of the act provides that for the purposes of the act the quota nationality of an immigrant shall be determined by the country of birth. The act further provides the following three exceptions to the general rule for the determination of the national quota to which a quota immigrant shall be charged:

(1) A child under [illegible] years of age must be charged to the quota of the native country of the accompanying parent, or of the father when both parents accompany the child, regardless of the country of the child's birth

unless the child was born in a nonquota country. (See Note 92.)

(2) A wife may be charged to the quota to which her husband of a different quota nationality is chargeable, when the monthly quota to which she would ordinarily be chargeable is exhausted, provided that (a) she is accompanying him, (b) he is entitled to an immigration visa, and (c) the monthly quota to which he is chargeable is not exhausted.

(3) An immigrant born in the United States who has lost his American citizenship shall be considered as having been born in the country of which he is a citizen or subject, or if he is not a citizen or subject of any country than in the country from which he comes, which means the country of his residence or domicile.

(b) An alien husband who is a lawful permanent resident of the United States may go abroad in order to confer upon his wife and his minor children the benefits of his quota nationality. The husband in such a case may return with a reentry permit, a nonquota immigration visa issued under section 4(b) of the act, a resident alien's border-crossing identification card in an appropriate case, or without any document if he is entitled to reenter the United States without documentation.

(c) An immigrant born of a father who had a diplomatic status or immunity at the time of the immigrant's birth is chargeable to the quota of the father's nationality (if the father was in the service of the country to which he owed allegiance), regardless of the country in which the immigrant was born.

(d) The case of an immigrant born on the high seas and not specifically entitled to nonquota status under any provision of the act or these regulations, and whose classi-

fication as a quota immigrant is not provided for in these regulations, should be referred to the Department for special instructions.

(22 CFR 61.250)

NOTE 105. FIRST-PREFERENCE CATEGORIES

Section 6 of the act provides that 50 percent of each quota shall be made available for aliens who are the parents of citizens of the United States, such citizens being 21 years of age or over, and for aliens who are husbands of citizens of the United States of any age by marriages occurring on or after July 1, 1932, and, in quotas of 300 or more, for quota immigrants who are skilled in agriculture, their wives, and dependent children under 18 years of age, if accompanying or following to join them. This section is not applicable to Chinese persons or to aliens racially ineligible to naturalization in the United States. (22 CFR 61.251)

NOTE 108. SECOND-PREFERENCE CATEGORY.

(a) Section 6 of the act provides that the second 50 percent of each quota plus any portion of the first 50 percent not required for the issuance of immigration visa to first-preference immigrants shall be made available for the unmarried children, under 21 years of age, and the wives of aliens who are lawful permanent residents of the United States. No petition procedure is prescribed by the act to establish second-preference status.

(b) Second preference under a quota is not available to Chinese persons or to aliens racially ineligible to naturalization.

(22 CFR 61.254)

NOTE 119. ISSUANCE OF QUOTA VISAS OUT OF TURN.

Under no circumstances should an applicant for a quota immigration visa be issued such a visa out of his proper turn with other qualified applicants in the same category, as this would have the effect of according the applicant an unauthorized preference over other qualified applicants having earlier priority. However, first priority over all nonpreference quota immigrants is provided for the immigrants mentioned in Notes 204(b), 205(c), and 221(f). (22 CFR 61.301)

NOTE 137. IMMIGRATION-VISA APPLICATION FORM.

Applications for immigration visas shall be made in duplicate on Forms 256a and 256b, which provide for the classification of each applicant as a quota or a nonquota immigrant and for the subclassification of each applicant as a first-preference-quota, second-preference-quota, or nonpreference-quota immigrant. Space is also provided for the classification of an immigrant not falling within any of the categories above mentioned. Supplies of the official immigration-visa application forms may be obtained upon requisition from the Department. (22 CFR 61.319)

NOTE 138. EXCLUDING PROVISIONS OF LAW TO BE EXPLAINED TO APPLICANTS.

An alien must state in his application for an immigration visa whether or not he is a member of any of the classes excluded under the immigration laws, which classes

are listed in the application. As the action to be taken on an application for an immigration visa may depend to a large extent upon the applicant's statements in this respect, the consular officer should be careful to see that before taking the oath the applicant fully understands the meaning of the excluded classes listed in the application. Consular officers should be prepared, upon the request of the applicant, to explain to him the pertinent excluding provisions of the law. The penalty for swearing falsely should be explained to an applicant if such action is deemed to be desirable. (22 CFR 61.320)

NOTE 145. SUPPORTING DOCUMENTS TO BE ATTACHED TO IMMIGRATION VISAS.

(a) Documents in duplicate which are required of an applicant under section 7(c) of the act and which are to be attached to his visa application are copies of public records "kept by the Government to which he owes allegiance", which are ascertained to be "available". The records may be those of the municipal, provincial, or national authorities. If the applicant is in possession of only one copy of any of the required documents a certified duplicate or photostatic copy of the original may be made from that copy.

(b) With reference to the term "dossier" there should be required any available official document showing an applicant's police record. Section 7(c) of the act requires the presentation of two copies of a dossier (or police record) from the country to which an alien owes allegiance. However, in view of the provisions of section 23 of the act an alien may be required to present similar evidence from

any other country in which the consular officer knows or has reason to believe the alien may have a record.

(c) With reference to the term "prison record" there should be required any available official document showing whether an applicant has been incarcerated in a penal institution.

(d) With reference to the term "military record" there should be required any available official document setting forth the applicant's record while serving with the military forces. (This does not refer to those personal documents, such as a discharge certificate or enrollment book, which are issued to remain in the individual's possession, although the consular officer may require an applicant to exhibit such a document for inspection if it is available and if it is deemed to be necessary to establish the applicant's identity or admissibility into the United States under the immigration laws.)

(e) The term "birth certificate" means a certificate issued by the custodian of records of births in the country of an applicant's birth and the names of the parents. A consular officer is to require and to attach to the visa application any other available satisfactory documentary evidence of birth if a birth certificate is not available and such evidence is necessary to establish an applicant's place or date of birth or parentage. In such a case a memorandum regarding the date and place of the applicant's birth as shown in any passport or other travel document he may have in possession should be attached to the visa.

(f) The phrase "all other available public records" as used in section 7(c) of the act, refers to available official

records necessary for the identification of an applicant or the determination of his admissibility into the United States under the immigration laws. A copy of the marriage record, for example, may or may not, according to the circumstances of the particular case, be a requisite document.

(g) When copies of public records kept by a government other than that to which an applicant owes allegiance are ascertained to be available and are necessary to establish an applicant's identity or admissibility into the United States under the immigration laws, as in the case of an applicant who has formerly owed allegiance to another government or of an applicant who is residing in a country other than the one to which he owes allegiance, the consular officer should require such documents and attach them to the original and duplicate copies of the visa application. (22 CFR 61.327)

NOTE 148. PRELIMINARY EXAMINATION OF DOCUMENTS.

(a) In communicating with a prospective immigrant who desires to apply for a visa, a consular officer, after advising the alien of the documentary and other requirements, may inform the alien that a preliminary examination will be made of such documents as he may submit, preferably by mail, at his own risk, and may state that he will advise the alien at a later date whether the documents appear to be sufficient and satisfactory so far as can be ascertained in advance of the required personal appearance of the applicant at the consular office to execute a formal application for a visa.

* * *

(c) When informing an alien that his documents appear to be sufficient and satisfactory, it should be added that no assurance can be given that a visa will be granted until the alien has personally appeared at the consular office, has been examined, and has been found to be eligible to receive a visa under the immigration laws and regulations. The alien should also be advised to present himself promptly at the consular office for visa examination, as new or additional documents may be required of him to meet any change which may occur in the circumstances of his case.

(d) If the documents submitted are insufficient or unsatisfactory, the letter informing the alien should advise him in what respects they are insufficient or unsatisfactory and that he may present such other documents as he may desire to submit. A suggestion that further documents may be submitted, however, would not be appropriate if the alien is found to be inadmissable into the United States on some ground which cannot be overcome by the submission of further documents.

(e) It is considered to be advisable for consular officers to retain the documents submitted in any case, pending the personal appearance of the applicant. (22 CFR 61.330)

NOTE 169. REFUSAL CARDS.

(a) Upon the refusal of an immigration visa, either formal or informal, on security grounds, and mandatory immigration grounds such as, for example, because the alien is found to be inadmissible into the United States on an offense involving moral turpitude, or because he is suf-

fering from a class-A medical defect, etc., visa refusal cards (Form 247) should be prepared in sufficient number to provide *one* copy to be retained in the files of the office of application, *one* copy to be sent to the supervisory consulate general or other central clearing office in the country of application, *one* copy to be sent to the central clearing office in the country of the alien's birth, and *one* copy to be sent to the central clearing office in the country of the alien's nationality. Fewer cards would, of course, have to be made in the case of an alien who, for example, applies in the country of his birth and nationality. Offices preparing or receiving such cards should arrange or file them in readily accessible order as promptly as possible.

(b) It is not necessary to prepare cards covering refusals of visas upon grounds which may possibly be overcome by *bona-fide* changes in the facts of a case or by the presentation of further documentary evidence of the true facts, as in the case of an alien initially considered likely to become a public charge, or an alien believed to be a contract laborer, or an alien suffering from a class-B medical defect. If it is suspected that fraud may be attempted at another office, the necessary refusal cards should be prepared and distributed.

(22 CFR 61.351)